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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE ROBERT MARTINEZ,

Defendant and Appellant.

A105213

(Contra Costa County
Super. Ct. No. 0314146)

Defendant Joe Robert Martinez appeals from his judgment of conviction following bifurcated jury and court trials on various alcohol-related Vehicle Code charges and allegations. He claims the trial court erred by failing to order production of evidence contained in the personnel files of one of the arresting officers, and by excluding evidence of that officer's prior inaccurate testimony. He further claims that a hearing regarding an officer's personnel files¹ must be conducted again because the custodians of documents were not properly sworn in and because the trial court violated his constitutional rights to present his defense when it struck the testimony of a defense witness. We affirm the judgment.

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) permits discovery of information contained in police officer personnel files that is relevant to a defendant's case. (See also Evid. Code, § 1043.)

STATEMENT OF THE CASE

Defendant was charged by information with driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), driving with a blood-alcohol content of .08 percent or greater (Veh. Code, §§ 23152, subd. (b), 23550), driving with a license suspended for prior alcohol-related Vehicle Code convictions (Veh. Code, § 14601.2, subd. (a)), and driving with knowledge of his suspended license (Veh. Code, § 14601.5). The information further alleged with respect to the first two charges that defendant had suffered three prior alcohol-related Vehicle Code violations. (Veh. Code, § 23550.) Defendant pleaded not guilty and denied the allegations.

Pursuant to defendant's *Pitchess* motion, the trial court examined the personnel files of San Pablo Police Officer Jeff Palmieri, and denied defendant's request for discovery of information in those files. Defendant waived his right to a jury trial on the suspended license charges and the enhancement allegations, and the court granted defendant's request to bifurcate trial on those matters from the remaining charges.

After holding a hearing pursuant to Evidence Code section 402,² the court denied defendant's request to introduce impeachment evidence regarding prior inaccurate testimony by Officer Palmieri. The court struck the testimony of defense witness Lavell Lester after he invoked his Fifth Amendment right to refrain from self-incrimination, and denied defendant's related motion for a mistrial.

A jury found defendant guilty of both charges within its consideration. The court found defendant guilty of the remaining charges and found true all pertinent special allegations. The trial court denied defendant's motion for a new trial based on the court's failure to disclose *Pitchess* material. The court sentenced defendant to a prison term of two years, consisting of two concurrent middle terms for the Vehicle Code section 23152 convictions, and two concurrent 180-day jail terms for each of the suspended license charges.

² All further statutory references are to the Evidence Code unless otherwise specified.

STATEMENT OF FACTS

At about 9:11 p.m. on December 12, 2002, Officer Palmieri was dispatched to the 2000 block of 19th Street, which is a dead-end street, to investigate a “man down” next to a blue SUV (sport utility vehicle). Officer Palmieri arrived at the end of 19th Street about five minutes later, to find a blue SUV parked diagonally to the east side curb with its engine running and its headlights on. There was a three-foot tall retaining wall at the end of 19th Street; the road was flanked on either side by residences. Davis Park was on the other side of the retaining wall. No other cars were parked on the east side of the street behind the SUV.

Officer Palmieri parked about 20 to 25 feet behind the SUV. He had begun to step out of his patrol car when the SUV’s tail lights engaged, its tires began to spin, and the SUV began to quickly move in reverse towards the patrol car. Officer Palmieri backed up his patrol car in order to avoid being hit by the SUV and engaged the patrol car’s overhead lights. The SUV moved about 25 feet before it came to a stop.

Officer Palmieri got out of the patrol car, approached the SUV, and found defendant in the driver’s seat. There was no one else in the SUV. Defendant told the officer that he did not know what he was doing there. Officer Palmieri immediately noticed that defendant’s speech was slurred, his eyes were red and glossy, and his breath smelled of alcohol. The officer asked defendant to step out of the vehicle. Defendant fell out of the car onto one knee, so the officer helped him walk to the nearby retaining wall. Officer Palmieri did not administer any field sobriety tests because defendant could not safely stand on his own. The officer arrested defendant for driving under the influence of alcohol.

About one or two minutes after defendant was seated on the wall, Officer White arrived to assist Officer Palmieri. The engine of defendant’s SUV³ was running and its headlights were on. The officers carried defendant to the patrol car, as defendant could

³ Although no documentary evidence was admitted to show that the SUV belonged to defendant, defense counsel referred to the vehicle as belonging to defendant.

not walk on his own. After defendant was placed in the back of the patrol car, the officers investigated the area around the SUV. The officers found two cans of cold beer, one open and one unopened.⁴

Officer Palmieri did not lose sight of the SUV after driving onto 19th Street and neither Officer Palmieri nor Officer White saw anybody else in or near the SUV before defendant's arrest. Officer White stayed with the SUV waiting for a tow truck to arrive and transport the vehicle. Officer White testified that the SUV was parked between the last two houses on the north end of 19th Street, not in front of a pink house at number 2024.

Defense witness Reina Mendieta testified that she was at home at 2024 19th Street in San Pablo on the evening of December 12, 2002, between 8:30 and 9 p.m. There are several houses between Mendieta's pink-colored home and Davis Park. It was dark outside. Mendieta went to her front porch and saw defendant sitting on the retaining wall, talking and laughing with a man who was not a police officer. Defendant and the man were close to each other and close to the SUV. Defendant's SUV was "badly" parked, diagonally to the curb.

The next time Mendieta looked outside her apartment, she saw two police officers with defendant, but only one patrol car. Defendant was still sitting on the wall. She did not believe that defendant's SUV had moved from its original location. The third time Mendieta looked out her window, she saw a second police car. Mendieta never saw anyone drive the SUV.

Officer Shilo Olson had a sample of defendant's blood drawn. Defendant's blood alcohol content was found to be .235 to .237 percent, which would ordinarily require consumption of over 13 alcoholic drinks. The next afternoon, defendant went to the San

⁴ Officer White testified that he found an open can of beer between the driver's and front passenger's seats, which the officer placed outside the vehicle. Officer Palmieri testified that he found the open can on the ground at the front of the SUV.

Pablo Police Department on his own initiative, asked to speak to Officer Palmieri, and told the officer that he did not remember what had happened the night before.

The parties stipulated that defendant's residence at the time of his arrest was 1504 San Joaquin Street, in Richmond, about four-and-a-half miles from where the officers found him with his SUV. The parties also stipulated that defendant knew that his driver's license was suspended at the time of his arrest.

DISCUSSION

I.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT OFFICER PALMIERI TESTIFIED INACCURATELY DURING A PRIOR CASE.

A. Facts.

Defendant attempted to use evidence of Officer Palmieri's inaccurate testimony in a prior case⁵ to show that he fabricated his testimony that he saw defendant drive the SUV. The prosecutor objected on the grounds that this evidence was irrelevant to the case at hand because Officer Palmieri's prior inaccurate testimony did not demonstrate moral turpitude, and would unduly consume the court's time. The trial court observed that prior bad acts could be used to impeach a witness's testimony and held a hearing pursuant to section 402 to determine the admissibility of the evidence. During this hearing, Officer Palmieri testified that in the prior case he conducted video recorded interviews of various witnesses, including a suspect, Gabriel Galvan. Officer Palmieri mistakenly recorded in his police report, and testified at the preliminary hearing, that Galvan stated that a man named Martinez⁶ repeatedly punched and kicked the victim,

⁵ The reporter's transcript of Officer Palmieri's prior inaccurate testimony is included in the clerk's transcript.

⁶ The defendant named Martinez from the prior case is no relation to the defendant in the current case.

Bravlio Becerra-Limon (Limon). The video recording of Galvan's interview showed that he did not identify Martinez as one of the men who assaulted Limon.

When asked how this error occurred, Officer Palmieri testified that he believed a sheet in the pad of paper in which he had written his notes flipped over when he briefly stepped away from preparing his report. He assumed that he did not check where he had left off reading his notes once he returned to writing the report. The officer testified that his having been awake for 18 to 20 hours at the time he was writing the report may have impacted the accuracy of his work.

Judge Berger, who presided over the prior case, found that Officer Palmieri did a poor job investigating that case and struck his testimony, but did not find that he committed perjury or hindered the investigation of the inaccuracies. An internal affairs investigation by the San Pablo Police Department of this inaccurate testimony resulted in findings of no intentional wrongdoing by Officer Palmieri.

After the hearing, the court excluded the evidence of Officer Palmieri's prior inaccurate testimony pursuant to section 352. It found that Officer Palmieri's prior inaccurate testimony did not demonstrate moral turpitude, and thus was not proper impeachment evidence. Further, the jury's evaluation of this evidence would essentially require a second trial, which would unduly consume the court's time and confuse the jury about their duties in the instant case.

B. Legal Analysis.

Any evidence that raises a reasonable doubt as to the defendant's guilt is generally relevant. (§ 350; *People v. Hall* (1986) 41 Cal.3d 826, 833.) The court may nonetheless exclude evidence if its probative value is substantially outweighed by the likelihood that its admission will consume an undue amount of time, confuse the issues at hand, or mislead the jury. (§ 352; *People v. Minifie* (1996) 13 Cal.4th 1055, 1069-1070.) The Court of Appeal will affirm the trial court's decision to exclude evidence pursuant to section 352 unless the court exercised its discretion in an arbitrary, capricious, or patently offensive manner that resulted in a miscarriage of justice. (§ 354; *People v. Ochoa*

(2001) 26 Cal.4th 398, 437-438, disapproved on other grounds as recognized by *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

A trial court's exclusion of evidence may infringe upon the defendant's constitutional rights to present a defense. (U.S. Const., 6th, 14th Amends.; *Crane v. Kentucky* (1986) 476 U.S. 683, 690 [defendant's rights to due process of law, to compel the presence of witnesses in his favor, and to cross-examine adverse witnesses assure him opportunity to present a defense]; *California v. Trombetta* (1984) 467 U.S. 479, 485; *People v. Cunningham* (2001) 25 Cal.4th 926, 999; *People v. Zapien* (1993) 4 Cal.4th 929, 1002-1003, superseded on other grounds by Pen. Code § 190.41.) The United States Constitution, however, leaves wide discretion to the trial courts to exclude irrelevant evidence. (*Crane v. Kentucky, supra*, 476 U.S. at p. 689.) The exclusion of defense evidence on a minor point does not interfere with the defendant's constitutional right to present his case. (*Id.* at p. 687.)

The trial court reasonably concluded that Officer Palmieri's previous inaccurate testimony was not relevant to defendant's case, finding that his errors in recording and testifying in the prior case were unintentional errors rather than purposeful fabrication of evidence. Here, defendant alleges that Officer Palmieri fabricated evidence from his own imagination. A prior incident of accidental misattribution of witness testimony is therefore not directly relevant to the currently alleged fabrication. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 201 [allegedly false prior complaint by victim not relevant to veracity of current complaint because falsity of prior complaint was speculative]; *People v. Thompson* (1980) 27 Cal.3d 303, 315 [prior bad act must be material to be admissible to show intent to commit currently alleged offense], disapproved on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) The trial court also observed that Officer Palmieri's prior accidental misrecording of evidence was unlikely to recur because he had recently been retrained in reliable evidence management techniques.

The trial court's findings fell within its discretion. However, even if the trial court erred in excluding evidence of Officer Palmieri's prior inaccurate testimony, any such error was harmless. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103, applying

harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence before the jury amply supported the conclusion that defendant drove his SUV while under the influence of alcohol.⁷ Officer White testified that the defendant's car engine was running when he arrived at the scene, supporting Officer Palmieri's account that defendant nearly backed into his patrol car. Both Officer White and Ms. Mendieta testified that defendant's car was parked askew to the curb, suggesting that someone who was intoxicated parked the vehicle.

Ms. Mendieta's testimony that defendant's car did not move was not highly credible. Her account was inconsistent with Officer White's observations about the location of defendant's SUV and how many police officers and patrol cars were present. She admitted that she only briefly observed the events in the street while engaging in her normal household activities. Ms. Mendieta's testimony did not clarify what portions of the evening's events she may have actually witnessed. Ultimately, defendant's being found in a residential neighborhood several miles from his home, alone with his vehicle and a few cans of cold beer, support the People's theory that defendant drove himself to that location and then moved the vehicle in Officer Palmieri's presence.

Even if the exclusion of Officer Palmieri's prior testimony was error, the corroboration of his account by other evidence shows that such error was harmless. Defendant's claim thus fails.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR DISCOVERY OF INFORMATION FROM OFFICER PALMIERI'S PERSONNEL RECORDS.

Defendant moved for pretrial discovery of information in Officer Palmieri's personnel records about complaints of his fabricating evidence. (§ 1043; *Pitchess, supra*, 11 Cal.3d 531.) Defendant argued that Officer Palmieri fabricated facts leading to his

⁷ Defendant did not at trial, and does not now, argue that he was sober at the time of his arrest.

arrest, and that other complaints about similar behavior would impeach the officer's credibility. The court found good cause to review Officer Palmieri's personnel records in chambers to determine whether they contained relevant, discoverable evidence regarding his possible dishonesty. The files contained records of two citizen complaints. One was irrelevant to defendant's allegations, while the other described his inaccurate testimony discussed in the previous section.

The court's observations during its in camera review of Officer Palmieri's personnel records were consistent with Officer Palmieri's testimony regarding those events at the section 402 hearing. "And so the Court, one, finds that there's nothing of ill will that was done here by Officer Palmieri. They were mistakes due to fatigue and not following through completely his training that he'd received with regard to how to write reports, how to take notes, how to review those prior to testimony. [¶] And it was a lesson that was learned by Officer Palmieri who since then has received training in each of those areas of where his supervisors and the chief found that he needed to be retrained because these were mistakes, but nothing related to malice or ill will or intentional was done. [¶] So, I'm not going to disclose this complaint because of those reasons, and don't find it that it [sic] would apply to fabrication of charges or evidence or acts of dishonesty or false arrest."

Police officers' personnel records are confidential. (Pen. Code, § 832.7, subd. (a).) A criminal defendant may seek discovery of an officer's personnel records if he believes that those records are relevant to his case. (§ 1043.) Unsubstantiated complaints may be discoverable if the information alleged is relevant to the defense case. (*Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, 829.) When a defendant requests access to *Pitchess* records, the trial court examines the files in chambers to determine what material, if any, is relevant to the proceeding. (§ 1045, subd. (b); Pen. Code, § 832.5.) The court must exclude from disclosure "[f]acts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." (§ 1045, subd. (b)(3).) This procedure balances the police officer's proper claim to confidentiality of his records

against the criminal defendant's interest in presenting his defense. (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.)

Defendant claims the court relied on an erroneous interpretation of the law in making its *Pitchess* ruling, in that it appeared to require malice or ill will on the part of the officer. Thus, defendant claims, we must review that issue de novo. (See *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 390-391.) He argues that any intent or ill will harbored by Officer Palmieri leading to his prior false testimony was irrelevant to whether he fabricated evidence in this case. We disagree.

A trial court's denial of production of law enforcement personnel records is ordinarily reviewed for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *Pitchess, supra*, 11 Cal.3d 531 at p. 535.) As discussed above, the trial court's finding that Officer Palmieri's prior testimony was not relevant to defendant's allegation of fabrication in the present case fell within the court's discretion. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) The court's decision not to disclose that portion of the officer's personnel records was therefore not an abuse of discretion.

Defendant also argues that Officer Palmieri's retraining constituted discipline, which is subject to disclosure. We disagree. The court may disclose any discipline imposed as a result of the investigation. (§ 1045, subd. (a); *City of San Jose v. Superior Court, supra*, 5 Cal.4th at pp. 54-56.) Penal Code section 832.5 creates a distinction between an agency's "disciplinary action" against a police officer and an agency decision that an officer needs "additional training."⁸ (Pen. Code, § 832.5, subds. (b), (c)(3).) Defendant's interpretation would render the statutory distinction between discipline and supplemental training unworkable. (See *City of San Jose v. Superior Court, supra*, 5 Cal.4th at p. 55 [distinct definitions for "discipline" and "conclusions," with different uses available for each, shows legislative intent not to treat those terms as overlapping].)

⁸ The law enforcement agency may consider unfounded citizen complaints in determining whether an individual officer requires counseling or additional training, but unfounded complaints may not be considered if the agency makes any determination about disciplinary action. (Pen. Code, § 832.5, subds. (b) & (c)(3).)

Even if the court's ruling was error, defendant has failed to show that such error prejudiced his case. As discussed in the preceding argument, the evidence against defendant was strong, even disregarding any uncorroborated portions of Officer Palmieri's testimony. The evidence already in defendant's possession regarding the prior incident mirrored the account of the erroneous testimony contained in the police department's investigation of those events. The trial court found no other complaints in Officer Palmieri's personnel file related to his credibility. Defendant has thus failed to show that any error from withholding the *Pitchess* material prejudiced his case.

III.

THE TRIAL COURT NEED NOT CONDUCT ANOTHER *PITCHESS* HEARING DUE TO THE TARDY SWEARING IN OF THE WITNESSES.

The custodian of records for the police department, Sergeant Thrower, and Brian Libow, who represented the City Attorney of San Pablo and was custodian of records for the city's files, produced Officer Palmieri's personnel records and testified at the in-chambers review of those materials. The trial court did not obtain Thrower's and Libow's oaths that their testimony was truthful until the end of the proceeding. Defendant claims that the trial court must conduct another in-chambers review of the records because the custodians may have testified falsely at the hearing, harming defendant's case. We disagree.

A criminal defendant who requests judicial review of officer personnel records is not represented by counsel during the review of the records in chambers. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1230, fn. 4.) The city attorney's status as an officer of the court offers the defendant some assurance that the records and testimony presented to the court are accurate and complete. (*Ibid.*) A defendant's interests are similarly protected by the fact that the custodian of records is placed under oath before responding to a trial court's questions during the inspection of records, because he would be subject to criminal prosecution if he should testify falsely. (*Id.* at p. 1230, fn. 4.)

A technical deficiency in the administration of the oath of honesty during a *Pitchess* hearing does not erase the protective effect of that oath. “It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner,” (Pen. Code, § 121.) Both Sergeant Thrower and Mr. Libow could still be found guilty of perjury if their statements during the *Pitchess* hearing were shown to be deliberate falsehoods,⁹ or of offering false documents for filing in court¹⁰ if the records they produced were inaccurate or incomplete. The threat of criminal or professional punishment, which protected defendant’s interests during the *Pitchess* hearing, thus remained intact.

Even if the irregularity in the oath sworn by the custodians of records theoretically reduced the reliability of their testimony or the records they produced, defendant has failed to show any prejudice arising from this error. Nothing in the record shows that the custodians of records failed to provide all relevant personnel records to the trial court or misrepresented the contents of the records. (See *People v. Mooc, supra*, 26 Cal.4th at p. 1220.) Without any evidence to the contrary, we must presume that the custodians of records performed their official duties by bringing to the court any material that was arguably relevant to the allegations in defendant’s *Pitchess* motion. (§ 664.)¹¹ Defendant’s claim thus fails.

⁹ “Every person who, having taken an oath that he or she will testify . . . truly before any competent tribunal . . . willfully and contrary to the oath, states as true any material matter which he or she knows to be false . . . is guilty of perjury.” (Pen. Code, § 118.)

¹⁰ “Every person guilty of preparing any false . . . record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced for any fraudulent or deceitful purpose, as genuine or true, upon any trial, proceeding, or inquiry whatever, authorized by law, is guilty of [a] felony.” (Pen. Code, § 134.)

¹¹ “It is presumed that official duty has been regularly performed.” (§ 664.)

IV.
THE COURT PROPERLY STRUCK LAVELLE LESTER'S
TESTIMONY FROM EVIDENCE.

Defense witness Lavelle Lester testified that he tried to buy defendant's SUV on the afternoon of December 12, 2002. He was riding his bike at around 3 to 5 p.m., when he noticed the vehicle with a "for sale" sign on it and knocked on the door of the home nearest to the vehicle to ask about its price. Defendant, who appeared to be intoxicated, answered the door with a beer in his hand. Lester asked if he could drive the vehicle, to which defendant agreed. Lester left his bicycle at defendant's house.

Lester drove the SUV around San Pablo and Richmond with defendant as a passenger, trying to negotiate a lower price for the vehicle. He thought that if defendant was more intoxicated he might lower the price, so he bought beer for defendant. Lester stopped to see friends to try to borrow money to buy the car. At about 8 p.m., Lester parked the SUV on 19th Street so he could try to borrow money from a friend who lived on the other side of Davis Park. Lester had been driving the SUV for about an hour or two and the sun was going down.¹² Defendant began to get irritated because he wanted to go home.

As Lester was telling defendant how long he would be gone, he noticed a police car approaching. Lester told defendant to get rid of the beer and then left through Davis Park. Lester saw defendant go to the front of the vehicle, then quickly go back to the wall. Lester believed defendant may have hidden the beer outside the front of the car. The officer got out of his vehicle and walked up to defendant, who was sitting on the retaining wall. Lester believed defendant could not have reversed the SUV because there was another car parked behind defendant's vehicle. When Lester returned to the park, he saw a police officer sitting in a patrol car and a tow truck coming down the street.

¹² Lester first testified that it was not yet dark when he stopped the SUV, but upon further questioning he testified that it was getting dark, then testified that it was "[l]ate in the evening." Later still, Lester testified that he recognized the patrol car from two blocks away because it was still light outside.

Lester left the area without approaching the remaining police officer. Lester volunteered that he did not tell the officer that he had been driving defendant's vehicle because he had "something on [him]." When asked by the prosecutor "what was in your pocket," Lester invoked his constitutional right to refrain from incriminating himself.

Over defense objection, the court granted the prosecutor's motion to strike all of Lester's testimony due to his refusal to answer questions. Defendant claims the trial court infringed upon his constitutional rights to present his defense by striking all of Lester's testimony. He argues that the court should have resorted to a less drastic remedy because the subject of the contents of Lester's pockets was not relevant to the case at hand. Respondent claims that Lester's possession of either drugs or a weapon on the night of defendant's arrest would have been relevant to show moral turpitude, which would bear on his credibility as a witness.

A witness in a criminal case may invoke his federal constitutional right to remain silent if his testimony may be used against him at a later criminal proceeding. (U.S. Const., 5th & 14th Amends.; *Whitlow v. Superior Court* (1948) 87 Cal.App.2d 175, 184; *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.) If a witness's refusal to answer questions denies a party its right to cross-examine that witness, the conventional remedy is to strike out the witness's direct examination testimony. (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735-736.) The court may strike the witness's testimony even if his refusal to testify arises from a valid claim of privilege. (*Ibid.*)

If the exclusion of testimony significantly diminishes the defendant's right to present witnesses and " 'calls into question the ultimate " 'integrity of the fact-finding process[,] ' " ' " the court must closely weigh the parties' respective interests in the admission or exclusion of the evidence. (*Fost v. Superior Court, supra*, 80 Cal.App.4th at p. 736, fn. 7, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 295, quoting *Berger v. California* (1969) 393 U.S. 314, 315.) Here, defendant's interest in presenting Lester's testimony was weak because of Lester's lack of credibility. Lester's lack of credibility also demonstrates that the exclusion of the evidence, if error, was harmless.

Lester's various accounts of the events leading to defendant's arrest were internally inconsistent, and inconsistent with the remainder of the witnesses. Lester stated that he test-drove defendant's car for only one to two hours. This account would leave a two to four hour gap between his initial inquiry about the SUV, between 3 and 5 p.m., and the arrival of police at the scene of defendant's arrest, after 9 p.m. Lester could not remember whether it was light or dark when the police arrived, even though he recollected watching defendant's activities as the officers arrived. Lester testified that he saw defendant quickly hide an open can of beer and rush back to the retaining wall, despite all other accounts that defendant was unable to walk due to his extreme intoxication. Further, Officer White testified that it was he who removed the open can from the SUV and put it near the front of the SUV, contradicting Lester's account that he saw defendant put the can of beer outside the SUV. Additionally, Lester's testimony conflicted with that of defendant's other witness, Ms. Mendieta, who testified that she saw defendant talking to a White man. Lester is African-American. Also, no one else testified that another vehicle was parked behind defendant's SUV. Defense counsel admitted in her opening statement that Lester's credibility would be impeached with numerous convictions for assault, robbery, and making terrorist threats. Thus, the jury was unlikely to find Lester to be a credible defense witness.

DISPOSITION

The judgment is affirmed.

Sepulveda, J.

We concur:

Reardon, Acting P. J.

Rivera, J.